

respect to such Claims. In such case, where any party believes a Claim may entail shared responsibility and that principles of comparative negligence and indemnity or responsibility are applicable, it shall confer with the other parties on management of the Claim in question. If the parties cannot agree on an approach to representation in the matter in question, each shall arrange to represent itself and to bear its own costs in connection therewith pending the outcome of such matter. Within 30 Days subsequent to the final, non-appealable resolution of the matter in question, whether by arbitration or by judicial proceedings, the parties shall adjust the costs of defense, including reimbursement of reasonable attorneys' fees and other litigation and defense costs, in accordance with this Section and consistent with the outcome of such proceedings concerning the respective liabilities of the parties on the Claim.

(k) In determining responsibilities and obligations for defending suits pursuant to subsection (j) above, specific consideration shall be given to the following factors: (i) the party performing the activity in question; (ii) the location of the activity and incident; (iii) contractual arrangements then governing the performance of the activity; and (iv) allegations of respective fault contained in the Claim.

Section 13.5 Insurance.

(a) Insurance During Construction. Company shall not proceed with Commencement of Construction or any installation work, and shall not thereafter commence any reconstruction, extensions or major renewals or replacements of the Network, until it has obtained or caused to be obtained insurance required under this subsection (a). Company and S&W shall not allow any of their respective subcontractors to proceed with Commencement of Construction or installation work or any such reconstruction, extension, renewal or replacement, until all similar insurance Company requires from its subcontractors as set forth in the contracting plan State approves pursuant to Section 9.1(a) has been obtained and approved by Company. Coverage shall commence before Company or any of its agents, employees or subcontractors exercises any right of entry onto Right of Way. Company shall carry or cause to be carried insurance throughout the period any construction or installation work or any such reconstruction, extension, renewal or replacement is performed as follows:

(i) Liability. Commercial general liability insurance for bodily injury (including death) and property damage which provides limits of \$5 million per occurrence and \$10 million annual aggregate. Coverages shall include:

- (A) premises and operations;
- (B) broad form property damage;
- (C) products and completed operations;
- (D) blanket contractual liability;

(E) personal injury and advertising liability, with the contractual exclusion deleted;

(F) owner's and contractor's protective liability;

(G) cross-liability and severability of interests; and

(H) independent contractors liability;

(ii) Automobile Liability Insurance. Automobile liability insurance respecting all owned, non-owned and hired vehicles for bodily injury (including death) and property damage that provides total limits of \$5 million combined single limit per accident;

(iii) Workers' Compensation/Employer's Liability Insurance. Statutory workers' compensation insurance, and employers' liability insurance for \$1 million per person for bodily injury by disease, \$2 million per occurrence for bodily injury by disease and \$1 million per person for bodily injury by accident, covering all employees engaged in services or operations under this Agreement. The policy shall include broad form all states/other states coverage;

(iv) Builder's Risk. Builder's risk insurance for the full replacement cost and demolition cost of the construction in question providing coverage for all risk of physical loss or damage to improvements which are in the course of construction (including but not limited to trenches and excavations), and all property which is incorporated or to be incorporated into the permanent installations; and

(v) Professional Liability. Professional liability or errors and omissions coverage specifically and exclusively covering the Network, with a limit of \$5 million for each claim and in the aggregate including defense costs, providing coverage on a claims made basis for negligent acts, errors or omissions in performing professional design, engineering and other technical services. The policy shall be retroactive to the date the design work commenced.

(b) Insurance During Maintenance and Operations. Company shall not commence any maintenance or operations until it has obtained or caused to be obtained the insurance required under this subsection (b). Company shall not allow any subcontractor to commence any maintenance or operations until all similar insurance Company requires from its subcontractors as set forth in the contracting plan State approves pursuant to Section 9.1(a) has been obtained and approved by Company. Company shall carry or cause to be carried insurance throughout the period of any maintenance and operations as follows:

(i) Liability. The same as required under subsection (a)(i) above;

(ii) Automobile Liability Insurance. The same as required under subsection (a)(ii) above;

(iii) Workers' Compensation/Employer's Liability Insurance. The same as required under subsection (a)(iii) above;

(iv) Property Insurance. Property insurance providing coverage against (A) all risk of physical damage or loss to all Network equipment, components and parts other than buried conduit, innerduct, cable and lines and (B) interruption or loss of revenues due to insured physical damage or loss, which coverages shall take effect upon Substantial Completion of each relevant Construction Segment. Coverage under item (A) shall include earth movement and flood, and additional costs of debris removal and demolition and shall be in an amount adequate to cover the probable maximum loss of the covered property without risk of co-insurance penalty determined by best available underwriting practices. Coverage under item (B) shall be in an amount of at least one full year of projected Total Revenues from occurrence of the insured damage or loss; and

(v) Professional Liability. The same as required under subsection (a)(v) above, to the extent professional engineering or technical services are utilized for maintenance or operations.

(c) General Insurance Requirements and Conditions.

(i) Each insurance policy required hereunder (or the particular insurance policies specified below) shall:

(A) be in form and substance as is then standard in and acceptable to the State for policies of like coverage, with current ISO simplified forms used whenever possible;

(B) be issued by insurance carriers licensed to do business in the State and having a current policyholder's management and financial size category rating of not less than "AVII" according to A.M. Best's Insurance Reports Key Rating Guide, or of recognized financial responsibility and otherwise agreed by the parties and approved by State in writing, which approval State shall not unreasonably withhold or delay;

(C) provide coverage on an "occurrence" basis and not a "claims made" basis (with the exception of professional liability and errors and omissions policies), and all project-specific professional liability and errors and omissions policies written on a "claims made" basis shall include a tail period of three years after expiration of the policy period;

(D) provide deductibles and self-insured retentions in reasonable amounts approved by State, which approval State shall not unreasonably withhold or delay, and provide that no deductibles or self-insured retentions shall be applied against State;

(E) provide for ten Days advance written notice to the State Project Manager of cancellation for failure to pay premium, and 30 Days advance written notice to the

State Project Manager of cancellation, suspension, change, reduction of coverage or non-renewal for any other reason;

(F) with respect to the commercial general liability, auto liability, builder's risk and property insurance policies:

(I) provide that the coverage thereof is primary and non-contributory coverage with respect to all named or additional insureds;

(II) show State, MnDOT, DOA and S&W Parties as additional insureds as their interests appear under additional insured endorsement forms approved by State covering claims and losses arising out of the named insured's operations, but in the case of builder's risk and property insurance policies subordinated to the Lender loss payee rights and/or any loss recovery owing to the Lender under documents authorizing Project Debt; and

(III) provide that the interests and protections of such additional insureds shall not be affected by any misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction of coverage; and

(G) contain no provisions or exclusions inconsistent with this Agreement.

(ii) Coverage limits for insurance policies shall be adjusted as follows:

(A) Liability and Automobile Liability. At least once every three years during the Agreement Term State and Company, in consultation with their insurance and risk management advisors, together shall review relevant risk factors and the adequacy of the policy limits described above in the light of such risk factors. The matters to be reviewed shall include but not be limited to (I) loss experience for the Network and for comparable communications systems and facilities and comparable businesses generally, (II) inflation and deflation, (III) premium rates, (IV) prevailing industry standards and practices and (V) then existing conditions and use of the Network. Company shall adjust the policy limits in accordance with the results of such review, as State reasonably approves. Any unresolved differences concerning such adjustment shall be resolved through arbitration pursuant to Section 16.7; provided, however, that the arbitrator(s) shall be experienced in the industry of insurance underwriting.

(B) Builder's Risk. The replacement cost of the covered property shall be reviewed annually by Company's insurance agent, and the coverage limit adjusted accordingly to maintain full replacement cost coverage without risk of co-insurance penalty.

(C) Property Insurance. The replacement cost for the covered property shall be reviewed annually by Company's insurance agent and the coverage limit

adjusted accordingly to maintain adequate probable maximum loss coverage without risk of co-insurance penalty. The amount of coverage for interruption or loss of revenue shall be adjusted annually to reflect the projected Total Revenues for the next 12-month period.

(iii) At the time Company is required to initially procure each insurance policy, and thereafter not less than 30 Days prior to the expiration date of each insurance policy required hereunder, Company shall deliver to the State Project Manager (A) a certificate of the insurance broker or agent in the current ACORD form or other form reasonably satisfactory to State, stating the identity of all carriers, identity of named and additional insureds, type of coverage, description of all endorsements, policy limits, deductibles, subrogation waiver and a statement of advance notice of cancellation consistent with this Agreement and (B) satisfactory evidence of payment of the premium therefor, . Company may submit a single certificate of insurance to satisfy its obligations under item (A) above. If Company has not provided the State Project Manager with the foregoing proof of coverage and payment within ten Days after receipt of written request therefor, State may, in addition to any other available remedy, without obligation and without further inquiry as to whether such insurance is actually in force, obtain such an insurance policy; and Company shall reimburse State for the cost thereof upon demand.

(iv) Upon request, Company and S&W shall make available for review by State at its offices complete certified copies of each insurance policy required under this Section 13.5, including applicable portions of blanket policies, modifications, renewals and replacements of insurance policies and additional insured and other required endorsements. In addition, Company and S&W shall immediately notify State whenever there is a change in coverage or cancellation of an insurance policy.

(v) Company shall obtain certificates of insurance for its subcontractors and deliver them to State if requested to do so.

(vi) Except as provided otherwise in Section 16.8, the foregoing requirements as to the types and limits of insurance coverage to be maintained by Company, and any approval of said insurance by State or Company, are not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by Company or S&W pursuant to this Agreement, including, but not limited to, the provisions concerning indemnification. State makes no representation that the types and limits of insurance coverage are adequate to protect Company and S&W.

(vii) If on account of Company's failure to comply with its insurance obligations under this Agreement, State, MnDOT or DOA is adjudged to be a co-insurer, then any loss or damage it shall sustain by reason thereof shall be borne by Company or S&W, but S&W shall bear liability only to the extent that S&W is actually responsible for such loss or damage. Company or S&W shall immediately pay the same upon receipt of written demand therefor and evidence of such loss or damage.

(viii) Any insurance coverage required in this Section 13.5 may be effected by a policy or policies of blanket insurance; provided that (A) the Network and related construction

and staging areas are specifically identified therein, by endorsement or otherwise, as included in the coverage provided; (B) the amount of the total insurance allocated to the Network and related construction and staging areas shall be such as to furnish protection equivalent to that which would be afforded by separate insurance policies in the amounts herein required; and (C) in all other respects any such blanket policy or policies shall comply with all other provisions of this Section 13.5. In any such case Company shall deliver to State a certificate evidencing such policy.

(viii) If the insurance carriers for any insurance policies described in this Section 13.5 deny coverage to Company, S&W or State with respect to any Claims reported to such carriers, Company, S&W and State shall cooperate in good faith to establish whether and to what extent to contest, and how to fund the cost of contesting, the denial of coverage.

(d) Waiver of Rights of Recovery and Subrogation.

(i) Notwithstanding any contrary provision of this Agreement (except item (ii) below), Company and S&W, on the one hand, and State, MnDOT and DOA, on the other hand, hereby waive any right to recover from the other or any of the other's respective agents and employees any loss or damage to the Network, Right of Way improvements or other property of Company, S&W or State resulting from any cause or hazard, including but not limited to the negligence or willful misconduct of the State, MnDOT, DOA, Company, S&W or any of their respective agents or employees. This waiver shall apply between the parties and to any property insurer claiming under or through Company, S&W or State as a result of any asserted rights of subrogation. It is the intention of the parties to look to their own property insurance coverage or self-insurance to manage risk to property rather than assert Claims against another party which could engender dispute.

(ii) Notwithstanding the foregoing, State does not waive any right to recover from Company or S&W any loss of or damage (A) to State property due to failure of Company or S&W to promptly restore State property within construction and staging areas, including but not limited to grass, plantings and paved surfaces, to a good, sound and safe condition or (B) to any State buildings which any Company Party or S&W Party reasonably anticipates or plans during the course of or in connection with construction.

(iii) For purposes of this subsection (d), so long as State elects to self-insure against property loss, State's waivers shall apply and be effective regardless of the absence of third party property insurance coverage.

Section 13.6 Hazardous Substances.

(a) Neither Company nor S&W shall use, store, treat, generate, transport or dispose of any Hazardous Substances on or about Right of Way or other property of State, nor shall it cause or permit any of its agents, officers, employees, subcontractors, consultants or users of the Network (other than State) to do so, except that Company and S&W may bring onto and store on

Right of Way reasonable quantities of Hazardous Substances contained in construction and maintenance materials and other components of the Network or necessary to the construction, operation and maintenance of the Network, so long as Company and S&W handle, transport, store, and monitor such Hazardous Substances in compliance with all applicable Laws and Regulations.

(b) If Company or S&W becomes aware of any presence, spill, discharge, deposit, emission, leakage or other release of any Hazardous Substances on or about any Right of Way, it shall immediately notify MnDOT orally and thereafter promptly notify MnDOT in writing.

(c) Company and S&W shall have no obligation, responsibility or liability with respect to remediation of Hazardous Substances within Right of Way which are not introduced to the Right of Way by Company, S&W or any of their respective agents, employees or subcontractors or any user of the Network (other than State) and the presence or release of which is not aggravated or exacerbated by the negligence or willful misconduct of Company or S&W or any of their respective agents, employees or subcontractors or any user (other than State).

(d) Company at its sole expense shall fully remediate, in compliance with applicable Laws and Regulations, and shall indemnify, defend, protect and hold harmless the State and its agents, officials and employees from and against any claim, cause of action, demand, loss, damage, obligation, liability, fine, charge, penalty, response cost, cost and expense in any way arising out of or relating to, any Hazardous Substances which Company or S&W or any of their respective agents, employees or subcontractors or any user (other than State) introduces or releases in, on or about any Right of Way or adjoining property, or the presence or release of which is known or apparent to Company's or S&W's on-site supervisory personnel and is aggravated or exacerbated by the negligence or willful misconduct of Company, S&W or any of their respective agents, employees or subcontractors or any user (other than State).

(e) S&W at its sole expense shall fully remediate, in compliance with applicable Laws and Regulations, and shall indemnify, defend, protect and hold harmless the State and its agents, officials and employees from and against any claim, cause of action, demand, loss, damage, obligation, liability, fine, charge, penalty, response cost, cost and expense in any way arising out of or relating to, any Hazardous Substances which S&W or any of its agents, employees or subcontractors introduces or releases in, on or about any Right of Way or adjoining property, or the presence or release of which is known or apparent to S&W's on-site supervisory personnel and is aggravated or exacerbated by the negligence or willful misconduct of S&W or any of its agents, employees or subcontractors.

(f) Without limiting its generality, the indemnities under subsections (d) and (e) above are intended to operate as an agreement pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9607(e) and Minn. Stat. §115B.10 of the Minnesota Response and Liability Act, to insure, protect, hold harmless and indemnify the indemnified parties from any liability pursuant thereto.

(g) Company and S&W waive and release State and its employees, officials and agents from any claims, causes of action and rights, known or unknown, suspected or unsuspected, which Company or S&W has or may have against State arising out of the presence at any time of Hazardous Substances in, on or under any Right of Way, except for such substances the presence or release of which is caused by the direct act of the State or any employee, official, agent or contractor of the State when acting in such capacity, provided that State is not relieved from any liability that may arise if Company or S&W becomes liable to third parties by reason of properly handling soil within Right of Way that is contaminated with pre-existing Hazardous Substances. Proper handling of the soil may include State's direction to leave contaminated soil within its existing location in the Right of Way.

(h) In the event Company or S&W removes any soil from Right of Way, or imports any soil onto the Right of Way, Company shall first sample the soil in accordance with applicable Laws and Regulations and good industry practice to determine whether the soil contains Hazardous Substances and to characterize and quantify any Hazardous Substances detected, shall sign and provide to State upon request a copy of all manifests for the transportation and disposal of the soil, and shall otherwise comply with all Laws and Regulations applicable to removal, transport and disposal of the soil. The soil sampling for imported soil must be adequate to determine that the soil is free of Hazardous Substances.

Section 13.7 Survival. The provisions of Sections 13.1, 13.2, 13.3, 13.4 and 13.6 shall survive the termination of this Agreement.

ARTICLE XIV REPRESENTATIONS AND WARRANTIES

Section 14.1 State Representations and Warranties. State hereby represents and warrants to Company and S&W as follows:

(a) State has taken all requisite action to authorize the execution and delivery of, and performance of its obligations under, this Agreement; and neither the execution and delivery by State of this Agreement, nor the consummation of the transactions contemplated hereby, is in conflict with any other agreements or instruments to which it is a party or by which it is bound.

(b) There is no litigation pending and served on State which challenges State's authority to execute, deliver or perform this Agreement, and State has disclosed to Company and S&W any threatened litigation with respect to such matters of which the Commissioner of MnDOT or the Commissioner of DOA is actually aware or has been advised in writing by the State Attorney General. State will disclose in writing to Company and S&W any future pending or threatened litigation with respect to such matters when State obtains actual knowledge thereof.

(c) MnDOT's title to the Right of Way in which the Network will be located is sufficient to permit construction, maintenance and operation of the Network for its intended purpose. In the event any third party asserts a real property estate or interest in Right of Way held or purportedly held by the State in fee title which would interfere with construction, maintenance and operation of the Network for its intended purpose, State shall defend its fee title against such assertion or otherwise take appropriate action to cure the interference.

Section 14.2 Company and S&W Representations and Warranties.

(a) Company hereby represents and warrants to State as follows:

(i) Company is a duly organized limited liability company created under the laws of the State of Colorado, has the requisite power to carry on its present and proposed activities, has all required licenses to carry on its present activities, and has full power, right and authority to enter into this Agreement and to perform each and all of the obligations of Company provided for herein and therein.

(ii) Company has taken or caused to be taken all requisite action under its governing documents to authorize the execution and delivery of, and the performance of its respective obligations under, this Agreement.

(iii) Each person executing this Agreement on behalf of Company has been duly authorized to execute this Agreement on behalf of Company.

(iv) Neither the execution and delivery by Company of this Agreement, nor the consummation of the transactions contemplated hereby, is in conflict with the governing

instruments of Company or any other agreements or instruments to which either is a party or by which either is bound.

(v) There is no litigation pending and served on Company which challenges Company's authority to execute, deliver or perform this Agreement, and Company has disclosed to State any threatened litigation with respect to such matters of which Company is aware. Company will disclose in writing to State any future pending or threatened litigation with respect to such matters when it then obtains actual knowledge thereof.

(vi) Company is in material compliance with all applicable Laws and Regulations, including but not limited to those applicable to Company's activities in connection with this Agreement.

(vii) There has been no collusion with or exercise of undue influence over State or officers, officials or employees of State respecting (A) State's qualification and selection of Company to undertake the activities contemplated herein, (B) the award of this Agreement or (C) Company's performance of the activities contemplated herein.

(b) S&W hereby represents and warrants to State as follows:

(i) S&W is a duly organized corporation duly organized created under the laws of the Commonwealth of Massachusetts, has the requisite power to carry on its present and proposed activities, has all required licenses to carry on its present activities, and has full power, right and authority to enter into this Agreement and to perform each and all of the obligations of S&W provided for herein.

(ii) S&W has taken or caused to be taken all requisite action under its governing documents to authorize the execution and delivery of, and the performance of its respective obligations under, this Agreement.

(iii) Each person executing this Agreement on behalf of S&W has been duly authorized to execute this Agreement on behalf of S&W.

(iv) Neither the execution and delivery by S&W of this Agreement, nor the consummation of the transactions contemplated hereby, is in conflict with the governing instruments of S&W or any other agreements or instruments to which either is a party or by which either is bound.

(v) There is no litigation pending and served on S&W which challenges S&W's authority to execute, deliver or perform this Agreement, and S&W has disclosed to State any threatened litigation with respect to such matters of which S&W is aware. S&W will disclose in writing to State any future pending or threatened litigation with respect to such matters when it then obtains actual knowledge thereof.

(vi) S&W is in material compliance with all applicable Laws and Regulations, including but not limited to those applicable to S&W's activities in connection with this Agreement.

(vii) There has been no collusion with or exercise of undue influence over State or officers, officials or employees of State respecting (A) State's qualification and selection of S&W to undertake the activities contemplated herein, (B) the award of this Agreement or (C) S&W's performance of the activities contemplated herein.

Section 14.3 Survival of Representations and Warranties. The representations and warranties of State, Company and S&W contained herein shall survive expiration or earlier termination of this Agreement and any Permits.

ARTICLE XV TERMINATION

Section 15.1 Termination for Public Convenience or Legislative Change.

(a) State may at any time in its sole discretion terminate this Agreement and Permits, or any of them, in whole or as to Phase 2 only, when State determines that such termination is in the best interests of State.

(b) Company shall have the right to terminate this Agreement and the Permits, in whole, and such termination shall be treated as a termination solely under this Section 15.1, if:

(i) a State constitutional amendment or State Law or Regulation shall take effect after the Agreement Date which:

(A) is specifically directed at this project or specifically at the fiber optic telecommunications industry in the State and creates an adversely disproportionate impact on Company and/or S&W, this Agreement, the proposed Network or access to substantial lengths of Right of Way for longitudinally installing fiber optic cable systems, and

(B) materially impairs Company's rights respecting the Network granted in Section 11.1, materially impairs Company's rights (as restricted, limited and conditioned) under this Agreement to own, plan, design, develop, construct, install, equip, market or operate the Network, or materially impairs Company's rights (as restricted, limited and conditioned) under this Agreement to impose and collect fees and charges from the users of the Network; and

(ii) such constitutional amendment or Law or Regulation has not been rescinded or amended to rectify such material impairment within 90 Days after the date the subject constitutional amendment or Law or Regulation takes effect, provided that if the effectiveness of such constitutional amendment or Law or Regulation is stayed by a court of law, the running of such 90 Day cure period shall be suspended for the duration of any such stay. Company and S&W shall have the right to immediately stop work when such constitutional amendment or Law or Regulation is passed and continuing until the date it is rescinded, amended to rectify the material impairment or stayed. The delay due to such work stoppage shall be considered an event of Force Majeure.

(c) If a constitutional amendment or Law or Regulation described in subsection (b) above is proposed or takes effect prior to Commencement of Construction of Phase 1 and Company and S&W nevertheless elect to proceed with Commencement of Construction of Phase 1, then Company shall be deemed to have irrevocably waived its right to terminate under subsection (b) above by reason of such constitutional amendment or Law or Regulation.

(d) If termination occurs under this Section and it is not a termination under Section 15.2, the following shall apply:

(i) State's exercise of its right to terminate under subsection (a) above shall be made by written notice to Company and S&W setting forth an effective date for termination, which shall not be less than 90 Days after the date of delivery of such notice and designating the agreements to be terminated; and any termination by Company under subsection (b) above shall be by like notice to State;

(ii) if the notice of termination is delivered before Commencement of Construction on Phase 1, Company and S&W shall be entitled to immediately cease work under this Agreement;

(iii) if the notice of termination is delivered before Commencement of Construction on Phase 1 or (notwithstanding Commencement of Construction) before all conditions to Commencement of Construction set forth in Section 5.5 are satisfied, waived or deferred in accordance with Section 5.7, then State shall pay Company the sum of (A) funds sufficient for Company to pay, redeem, defease or otherwise provide for the satisfaction of any outstanding Project Debt, plus (B) funds sufficient for Company to satisfy, assume the obligation to pay or provide for the payment of any amounts, charges, penalties or damages owing by Company or S&W under any Key Contracts approved by State under Section 9.1(a) which are not terminable without charge, penalty or damage on or prior to the effective date of termination, (C) all reasonable costs Company or S&W incurs in connection with the Network up to the effective date of termination based on an audit of its records, except costs in connection with Company's or S&W's preparation and presentation respecting the request for proposals, in connection with preparation of any business or financing plans or other organization of its business, or in connection with negotiation of this Agreement, and (D) all reasonable costs Company incurs in connection with termination of User Agreements with affected Collocating Customers which State elects not to assume pursuant to Section 15.5, based on an audit of Company's records; provided that if the termination by State is only as to Phase 2, then such compensation under items (A), (B), (C) and (D) above shall be owing only with respect to Phase 2, and the outstanding Project Debt, cancellation costs for Key Contracts and design, construction and operating costs shall be apportioned to Phase 2 on an equitable basis;

(iv) if the notice of termination is delivered after Commencement of Construction on Phase 1 and after all conditions to Commencement of Construction set forth in Section 5.5 are satisfied, waived or deferred in accordance with Section 5.7, then State shall pay Company the greater of (A) the fair market value of the Network as a going concern plus the sum described in subsection (d)(iii)(D) above or (B) the sums described in subsection (d)(iii) above; and

(v) no dispute concerning the amount of compensation owing Company under subsection (d)(iii) or (iv) above shall affect or delay the effective termination date; but

Company's Claim to compensation shall survive termination and shall be subject to dispute resolution pursuant to Section 16.7.

Section 15.2 Other Unilateral Rights to Terminate.

(a) Each of (1) State and (2) Company shall have the right to terminate this Agreement and the Permits in the event of (i) a material default by the other party (and, as to State's right, a material default by S&W), as provided in Sections 16.3(b)(ii) and 16.6(a)(i), (ii) a materially adverse decision in any litigation challenging the validity of this Agreement or its procurement (unless this Agreement survives such decision by application of Section 20.12(b)) or (iii) a material adverse decision any litigation or administrative proceeding concerning the validity of Section 11.1 (including but not limited to any decision in another case which sets firm precedent under similar facts and circumstances against the validity of Section 11.1) The parties recognize and acknowledge that State may find it necessary to terminate under item (iii) above due to, among other things, the concerns and reasons recited in Section 1.9.

(b) State shall have the right to terminate this Agreement and the Permits, in whole or in part, in the event Company and/or S&W fail in any material respect to meet a deadline (other than liquidated damages deadlines) set forth on the Schedule of Performance attached hereto as Exhibit F as such deadline may be extended or modified pursuant to this Agreement, unless such failure is proximately caused by a State Default under Section 16.4. Notwithstanding the foregoing, State shall not exercise its right to terminate this Agreement for failure of Company or S&W to meet a deadline for satisfaction of a condition precedent set forth in Section 5.5 if under the then-existing facts and circumstances it is evident that significant progress has been made in satisfying the condition precedent and it is likely to be satisfied in due course without causing a failure to meet the deadline for Commencement of Construction of Phase 1.

(c) Company shall have the right to terminate this Agreement and the Permits in whole prior to Commencement of Construction for Phase 1 if:

(i) despite its and S&W's good faith and diligent efforts, Company determines in good faith that it will be unable to satisfy any condition precedent set forth in Section 5.5, or any such condition precedent is not satisfied, within the time required under the Schedule of Performance for Commencement of Construction of Phase 1 (as the same may be extended pursuant to subsection (b) above or otherwise in this Agreement);

(ii) despite its good faith and diligent efforts, Company is unable to reach agreement with S&W on the terms of the Key Contract between Company and S&W or is unable to reach agreement with State on the final Performance Standards;

(iii) events of Force Majeure continue to cause delay in Commencement of Construction beyond the aggregate period of extension permitted under Section 10.4(a)(vi); or

(iv) a constitutional amendment or Law or Regulation having the same purpose, scope and effect as described in Section 15.1(b)(i) is placed into effect by the United

States or any local government after the Agreement Date and is not rescinded, amended or stayed as and when described in Section 15.1(b)(ii). Company and S&W shall have the right to immediately stop work when such constitutional amendment or Law or Regulation is passed and continuing until the date it is rescinded, amended to rectify the material impairment or stayed. The delay due to such work stoppage shall be considered an event of Force Majeure. If such a constitutional amendment or Law or Regulation is proposed or takes effect prior to Commencement of Construction of Phase 1 and Company and S&W nevertheless elect to proceed with Commencement of Construction of Phase 1, then Company shall be deemed to have irrevocably waived its right to terminate under this subsection (c)(iv).

Section 15.3 Termination Upon Expiration of Term. This Agreement and the Permits shall automatically terminate at the expiration of the Term.

Section 15.4 Title to Network; Disposition Upon Termination.

(a) At all times during the Term, Company shall be the sole owner of the Network and all Equipment (except that ownership of Intellectual Property shall be governed by Section 17.6).

(b) Upon expiration or earlier termination of the Term for any reason, ownership, possession, control, operation and management of the Network and all Equipment shall automatically vest in State, except as expressly provided otherwise in Section 5.7(d) and except that upon a termination due to a State Default or due to any event described in Section 15.2(a)(ii) or (iii) or 15.2(c)(iv) Company may elect to retain ownership of and remove Equipment. Company shall commence any such removal within 30 Days and complete any such removal within six months after termination, unless State and Company agree in writing to a different deadline to complete removal. Upon expiration or earlier termination of the Term, ownership and control of Intellectual Property, including but not limited to software licenses, respecting the Network and Equipment shall be governed by Section 17.7. Whenever title to the Network or any Equipment vests in State, Company shall, promptly after receiving a written request therefor from State, deliver to State an executed bill of sale, in form reasonably acceptable to State, confirming the transfer of title, but no such bill of sale shall be necessary to vest title in State.

(c) Whenever title to the Network or Equipment vests in State, State shall have no obligation to pay any compensation therefor except as follows:

(i) to the extent provided in Section 15.1 or 16.6; or

(ii) if, after a termination of this Agreement other than under Section 15.1, 16.3 or 16.6, State receives revenues or other monetary compensation from its own operation of the Network or from a sale, lease or other transfer thereof to a third party, then State shall pay to Company the amount of Company's unamortized capital investment in the Network and Equipment prior to the transfer of title to State, as properly reflected in Company's books, from any such revenues or other monetary compensation remaining after (A) allocation or reduction to pay or reimburse all costs and expenses State incurs in connection with owning, permitting,

design, construction, procurement, installation, operation, administration, management, maintenance, repair, upgrade, replacement and extension of the Network and Equipment, or in connection with negotiating, performing, administering and enforcing any agreements between State and any third party relating to the Network, including but not limited to reasonably allocated overhead and administrative expenses, (B) allocation to establish and maintain reasonable reserves for maintenance and technology upgrades, (C) payment of any amounts owing to Lenders under Section 18.3(c) and (D) application to offset any Claims or judgments owing from Company or S&W to State.

(d) Except in the case of termination by State under Section 15.1(a) or by Company under Section 15.2(a)(ii) or (iii) or 15.2(c)(iv), State shall have the right to require Company to remove any and all Equipment and other portions of the Network, other than buried conduit, innerduct and cable, underground footings and concrete pads at grade. State may exercise such right by delivering written request for removal to Company at any time before or within six months after the expiration or effective date of any earlier termination of the Term. Within the latter to occur of six months after receipt of State's written request or the expiration or effective date of earlier termination of the Term, Company shall remove or cause to be removed all the Equipment and other portions of the Network described in State's written request.

(e) Whenever the User Agreement of any Collocating Customer expires or earlier terminates for any reason (including but not limited to expiration of the Term or State's election to earlier terminate any such User Agreement pursuant to Section 15.5), the Collocating Customer shall have the right, and State shall have the right to require the Collocating Customer, to remove any and all facilities of the Collocating Customer located on Right of Way or other State property, other than buried conduit, innerduct and cable, underground footings and concrete pads at grade. State may exercise such right by delivering written request for removal to Company at any time before or within six months after the expiration or effective date of any earlier termination of the Collocating Customer's User Agreement. Within the latter to occur of a reasonable period of time set forth in the User Agreement, but in any event not more than six months, after receipt of State's written request or the expiration or effective date of earlier termination of the Collocating Customer's User Agreement, Company shall remove or cause to be removed all the Collocating Customer facilities described in State's written request. In the event State does not require removal and Company does not complete removal of any Collocating Customer facilities by the expiration of the Collocating Customer's User Agreement or within 60 Days after the effective date of any earlier termination of the Collocating Customer's User Agreement, ownership, possession, control, operation and management of such facilities shall automatically vest in State without compensation. Whenever title to the facilities of any Collocating Customer vests in State, Company shall, promptly after receiving a written request therefor from State, deliver to State a bill of sale executed by the Collocating Customer, in form reasonably acceptable to State, confirming the transfer of title, but no such bill of sale shall be necessary to vest title in State.

(f) If at the effective date of termination Company and S&W are in the process of constructing all or part of the Network, Company and S&W immediately shall safely secure

construction and staging areas and construction materials and equipment in a manner satisfactory to State, and shall cooperate with State in transferring control and management of the construction and construction sites.

Section 15.5 Disposition of Collateral Agreements.

(a) Company and S&W shall deliver to State for its review at least 60 Days prior to the effective date of termination under Section 15.1 or the expiration of the Term, and as promptly as possible in the case of a termination pursuant to Section 15.2, true and complete copies of all Key Contracts, User Agreements and other operating, service, maintenance, Equipment leasing or finance, management and other contracts and agreements which are in then effect and pertain to the Network (or portion thereof which is the subject of termination).

(b) In the case of a termination under Section 15.1 or 16.6(a)(i), on the effective date of termination:

(i) Company and S&W shall terminate, or cause to be terminated, effective on the same date as the effective date of termination of this Agreement, any such Key Contracts, User Agreements, Agreements and other contracts and agreements which are terminable without damage, charge or penalty and which State elects, in its sole discretion, not to assume; and

(ii) at State's election, either (A) State shall assume any Key Contracts, User Agreements and other contracts and agreements which are not terminable without damage, charge or penalty on or prior to the effective date of termination or (B) Company and S&W shall terminate, or cause to be terminated, effective on the same date as the effective date of termination of this Agreement, any such Key Contracts, User Agreements and other contracts and agreements which State elects, in its sole discretion, not to assume and State shall assume responsibility for and waive any claims against Company and/or S&W with respect to any damages, charges or penalties incurred by Company and/or S&W as a result of such termination.

(c) In the case of any termination of this Agreement other than under Sections 15.1 and 16.6(a)(i), Company and S&W shall terminate, or cause to be terminated, effective on the same date as the effective date of termination of this Agreement, any Key Contracts, User Agreements and other contracts and agreements which State elects, in its sole discretion, not to assume.

(d) On the effective date of termination Company, S&W and State shall execute and deliver a written assignment and assumption agreement respecting any such Key Contracts, User Agreements and other contracts and agreements which State elects to assume under subsection (c) and (d) above.

(e) State's assumption of any such contracts and agreements shall pertain only to obligations arising from and after the effective date of termination.

Section 15.6 Liability After Termination.

(a) In the event a party terminates this Agreement by reason of a material default of the other party, such termination shall not excuse the defaulting party from any liability arising out of such default as provided in this Agreement.

(b) In case of a termination under Section 15.2 (other than Section 15.2(a)(i)) no party shall have any further obligation or liability except for performance of their respective obligations under Sections 15.4 and 15.5 (which, however, do not apply to termination under Section 15.2(c)(i), (ii) and (iii)) and as provided in Section 20.11.

Section 15.7 S&W Unilateral Rights to Terminate Obligations.

(a) S&W shall have the right to terminate its obligations under this Agreement and the S&W Guaranty:

(i) if, despite its and Company's good faith and diligent efforts, S&W determines in good faith that it will be unable to satisfy any condition precedent set forth in Section 5.5, or any such condition precedent is not satisfied, within the time required under the Schedule of Performance for Commencement of Construction of Phase 1 (as the same may be extended pursuant to Section 15.2(b) or otherwise in this Agreement); or

(ii) if despite its diligent and good faith efforts, S&W is unable to reach agreement with Company on the terms of the Key Contract between Company and S&W; or

(iii) in the event of a materially adverse decision in any litigation challenging the validity of this Agreement or its procurement (unless this Agreement survives such decision by application of Section 20.12(b)); or

(iv) if events of Force Majeure continue to cause delay in Commencement of Construction beyond the aggregate period of extension permitted under Section 10.4(a)(vi); or

(v) if S&W is entitled to and does stop work in accordance with Section 5.8(a), 10.4(c), 15.1(b)(ii) or 16.6(a)(ii) and such work stoppage continues for a period of one year, or if a discrete event of Force Majeure occurs and causes stoppage of all substantial construction work on the Network for a consecutive period of one year; or

(vi) in the event of a material default by State which is not cured within any applicable cure period, as more particularly provided in Sections 16.6(a)(ii).

(b) If S&W terminates its obligations under this Agreement and the S&W Guaranty pursuant to subsection (a)(vi) above, such termination shall not excuse State from any liability arising out of such default as provided in this Agreement.

(c) If S&W terminates its obligations under this Agreement and the S&W Guaranty pursuant to subsection (a)(i), (ii), (iii), (iv) or (v) above, neither State nor Company, on the one hand, nor S&W on the other hand, shall have any further obligation or liability to the other except (i) under the S&W Guaranty, but only with respect to work completed up to the effective date of termination, (ii) as provided in Section 20.11 or (iii) as between Company and S&W, as may be provided otherwise in their Key Contract.

(d) S&W shall have no right to unilaterally terminate this Agreement. Notwithstanding termination by S&W of its obligations under this Agreement, this Agreement shall continue in effect respecting the rights and obligations inter se of State and Company.

ARTICLE XVI DEFAULT AND REMEDIES

Section 16.1 Company or S&W Defaults. Each of the following events with respect to Company shall constitute a Company Default, and each of the following events with respect to S&W shall constitute an S&W Default:

- (a) Company or S&W shall fail to pay to State when due moneys due and payable to State hereunder;
- (b) Company fails to effectively respond to any serious or material disruption in the communications services it is required to provide to State via the Network and related Equipment by the means and procedures and within the response times set forth in the Performance Standards and the approved O,A&M Plan;
- (c) Company or S&W shall fail to timely observe or perform any other covenant, agreement, obligation, term or condition required to be observed or performed by Company or S&W under this Agreement;
- (d) any representation or warranty made by Company or S&W herein shall be inaccurate or misleading in any material respect on the date made or deemed made;
- (e) Company or S&W in any of its reports to be submitted to State hereunder shall misrepresent or omit any material information required to be included therein;
- (f) Company or S&W shall commence a voluntary case or other proceeding seeking liquidation, reorganization, or other relief with respect to itself or its debts under any bankruptcy, insolvency, or other similar law now or hereafter in effect; shall seek the appointment of a trustee, receiver, liquidator, custodian or other similar official of Company or S&W or any substantial part of Company's or S&W's assets; shall file an answer admitting the material allegations of a petition filed against Company or S&W in any involuntary case or other proceeding commenced against Company or S&W; shall consent to any such relief or to the appointment of or taking possession by any such official in any voluntary case or other proceeding commenced against Company or S&W; shall make an assignment for the benefit of creditors; shall fail, be unable, or admit in writing the inability generally to pay Company's or S&W's debts as they become due; or shall take any action to authorize any of the foregoing;
- (g) an involuntary case or other proceeding shall be commenced against Company or S&W seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to Company's or S&W's debts under any bankruptcy, insolvency or other similar law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of Company or S&W or any substantial part of Company's or S&W's assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case or

other proceeding shall not be contested by Company or S&W in good faith or shall remain undismissed and unstayed for a period of 90 Days; or

(h) any event of default or failure to perform by Company or S&W occurs under any Permit or the S&W Guaranty.

Section 16.2 Cure Periods. Company or S&W shall have the following cure periods with respect to the following Company or S&W Defaults:

(a) respecting a Company or S&W Default under Section 16.1(a), a period of 30 Days after Company or S&W receives written notice of the Company or S&W Default, except to the extent of amounts being contested in good faith, in which case cure must be effected within 30 Days after a final determination of the amount owed; provided that such cure period shall not preclude or delay State's immediate exercise, without notice or demand, of its remedy set forth in Section 16.3(c);

(b) respecting a Company Default under Section 16.1(b), a period of 10 Days after Company receives written or electronic notice of the Company Default; provided that such cure period shall not preclude or delay State's immediate exercise, without notice or demand, of its remedy set forth in Section 16.3(c), and shall not delay the accrual of any liquidated damages owing under Section 16.3(a)(iv) by reason of such Company Default;

(c) respecting a Company or S&W Default under Section 16.1(c), (d) or (e), a period of 60 Days after Company or S&W receives written notice of the Company or S&W Default; provided that (i) if the Company or S&W Default is of such a nature that the cure cannot with diligence be completed within such time period and Company or S&W has commenced meaningful steps to cure promptly after receiving the default notice, Company or S&W shall have such additional period of time, up to a maximum cure period of 120 Days, as is reasonably necessary to diligently effect cure, and (ii) no such cure period shall extend the date for commencing payment of liquidated damages under Section 16.3(c);

(d) respecting a Company Default under Section 16.1(f) or (g), no cure period;

(e) respecting an S&W Default under Section 16.1(f) or (g), no cure period for S&W but a period of 90 Days for Company to effect cure by entering into (i) a new Key Contract for engineering, procurement and construction services with a contractor State approves pursuant to Section 9.1(a) and on terms required under Section 9.1(b), and (ii) a new guaranty and warranty from such contractor on terms required under Section 5.8(e); and

(f) respecting a Company or S&W Default under Section 16.1(h), the cure period, if any, set forth in the Permit or S&W Guaranty.

Section 16.3 State Remedies.

(a) State shall have the following liquidated damages remedies.

(i) If Company and S&W fail to achieve completion, required test results and cutover of DS3 capacity between any MNet hub or MnDOT regional office and the central hub in the Centennial Office Building in St. Paul (a "route") or by the milestone for commencing liquidated damages as to such route set forth in the Schedule of Performance (as such date may be extended pursuant to this Agreement), Company and S&W shall thereafter, and until such completion, required test results and cutover occur, collectively owe to State liquidated damages in the amount for such route set forth in Exhibit F attached to this Agreement. If an MNet hub and a MnDOT regional office are located in the same city or in the same location, liquidated damages shall be owing separately for each (i.e. liquidated damages shall be twice the amount described above). No route shall be considered cutover and placed in service unless and until the required service at and to the St. Paul hub is established.

(ii) If Company and S&W fail to achieve completion, required test results and delivery to State of any portion of the State's dark fiber strands in the metro portion of the Network as set forth in the maps and plans attached to this Agreement as Exhibit A by the applicable milestone for commencing liquidated damages for such segment set forth in the Schedule of Performance (as such date may be extended pursuant to this Agreement), Company and S&W shall thereafter, and until such completion, required test results and delivery occur, collectively owe to State liquidated damages equal to \$50 per mile per day.

(iii) If Company and S&W fail to achieve completion, required test results and delivery of any portion of the \$5 million worth of ITS and TMC improvements to be constructed pursuant to Section 3.3(e) by the applicable milestone for commencing liquidated damages for such portion agreed upon among Company, S&W and State pursuant to Section 3.3(e)(ii) (as such date may be extended pursuant to this Agreement), Company and S&W shall thereafter, and until such completion, required test results and delivery occur, collectively owe to State liquidated damages in the respective amounts agreed upon among Company, S&W and State pursuant to Section 3.3(e)(ii).

(iv) If Company fails to satisfy a Performance Standard, Company shall owe to State, for each hour and Day that the Performance Standard is not satisfied, liquidated damages in the respective amounts agreed upon among Company, S&W and State pursuant to Section 7.2(b).

(v) Liquidated damages owing under any of subsections (a)(i), (ii), (iii) and (iv) above are cumulative of and in addition to liquidated damages arising under any other such subsection.

(vi) If Company and S&W achieve a Cutover Date for any route or portion of Phase 1 in advance of the liquidated damages milestone therefor and as a result thereof State actually sheds or avoids costs chargeable to State by its pre-existing telecommunications service provider for any period between such Cutover Date and such liquidated damages milestone, then Company and S&W may offset any construction liquidated damages which accrue subsequent to such Cutover Date with respect to other routes or portions of Phase 1 by up to the amount of such

avoided costs. Upon request, State shall provide to Company and S&W information on State's calculation of the avoided costs.

(vii) Notwithstanding the foregoing, if S&W suspends work in accordance with Section 5.8(a), then S&W shall have no liability for liquidated damages owing under subsections (a)(i), (ii) and (iii) above and actually resulting from such suspension of work, and such liquidated damages shall be the sole liability of Company

(viii) Whenever liquidated damages accrue, State shall deliver written notice to Company and S&W stating such fact and State's calculation of amounts theretofore accrued and per diem and monthly accruals thereafter. Until Company and S&W receive further notice from State of any recalculation of accrued or accruing liquidated damages, Company and S&W (to the extent of its liability) shall pay the accrued and accruing liquidated damages to State monthly in arrears, on the first day of each month, without further notice or demand, with the first payment due 30 Days after receipt of State's notice.

(ix) Company and S&W understand, acknowledge and agree that:

(A) if they fail to achieve timely completion, Acceptance and cutover, or if they fail to satisfy Performance Standards, State will suffer substantial costs of procuring and utilizing substitute communications services, loss of substantial benefits to the State from operation of the TMC and Intelligent Transportation Systems or operation of the Network, and additional costs of administering this Agreement and performing Oversight, and that Company and S&W would be liable for such costs;

(B) because of the unique nature of the project to be undertaken and the uncertainty in identifying and quantifying such costs and losses, in part due to the uncertainty over the level of demand State will have for communications services, it is extremely difficult and impracticable to ascertain and determine actual costs State will incur due to such failure or the interest and earnings State otherwise would have earned on State funds applied to pay such costs;

(C) accordingly, the parties have agreed to liquidated damages as the best and most practicable means to compensate State for such costs and losses and to avoid disputes over damages owing to State; and

(D) such liquidated damages are intended to compensate State solely for, and are State's exclusive damage remedy for, such costs and lost benefits, interest and earnings due to Company's and S&W's failure to meet such milestone or to satisfy Performance Standards, and shall not excuse Company and S&W from liability for any other Company or S&W Default.

(b) Upon the occurrence of a Company or S&W Default and expiration, without full cure, of any cure period available respecting such Company or S&W Default, State may exercise any one or more of the following remedies as State in its sole discretion shall determine:

(i) in the event of a material Company or S&W Default, Company's and/or S&W's immediate assignment to State of any guarantees, warranties, bonds, deposits, security deposits, accounts and similar rights and benefits held by Company or S&W subject, however, to any prior rights and interests of Lenders;

(ii) in the event of a material Company or S&W Default, the termination of this Agreement and the Permits, or any of them, which termination shall, among other things, automatically terminate all of Company's or S&W's rights under Article III, whereupon Company and S&W shall take all action required to be taken by Company or S&W under Sections 15.4 and 15.5 and in addition transfer and deliver to State (A) all final record maps and as-built drawings and specifications of the Network, design and engineering documents, geotechnical soils data and analyses, property acquisition documents, records of payment and related correspondence, engineers' and inspectors' diaries and reports, utility relocation plans and agreements, maps and other documents, drawings and work product relating to any terminated portion of the Network, (B) Intellectual Property to the extent required under Section 17.6 and (C) all of Company's and S&W's right, title and interest therein and thereto;

(iii) in the event of a material Company or S&W Default, the development by State, directly or indirectly, of the Network or any portion thereof or the entering into of a new agreement with a subsequent proposer for the Network, including a system essentially identical to that which is the subject of this Agreement and/or any alternative thereto, all without further obligation to Company or S&W;

(iv) in the event of a material Company or S&W Default, action to seek and obtain the appointment of a receiver for all or any portion of the Network, with full right and authority to control, design, construct, develop, operate, maintain and repair the same, collect and account for revenues therefrom and pay costs relating thereto;

(v) payment and performance of Company's or S&W's obligations as more particularly set forth in subsection (d) below;

(vi) exercise any right or remedy available to State under the terms of any bond, policy of insurance, guaranty of completion, warranty against defects or other guaranty, warranty, contract or agreement providing relief or remedy to State on account of the Company Default or S&W Default;

(vii) as against Company, the exercise, in connection with both Company Defaults and S&W Defaults, of any other rights and remedies available to State under this Agreement or the Permits or available to State at law or in equity, based on any applicable theory, including but not limited to recovery of damages (including consequential damages) to the extent provided by law; and

(viii) as against S&W, in connection with S&W Defaults only, recovery of damages to the extent provided by law and the exercise or award of equitable remedies available to State, subject, however, to the limitations on S&W's liability set forth in Section 16.8.

(c) Without notice, without awaiting lapse of the period to cure any Company or S&W Default, and even in the absence of a Company or S&W Default, in the event of (i) any disruption in the communications services Company is required to provide to State via the Network and related Equipment which is not cured by the means and procedures and within the response times set forth in the Performance Standards and the approved O,A&M Plan, or (ii) existence of a condition on or affecting the Network which State has identified to Company and Company has failed to immediately rectify and which State believes in good faith poses an imminent threat of material and continuing disruption of such communications services, State shall have the right to ex parte application (noticed application and hearing if practicable under the circumstances) for and appointment of a receiver of the Network. The receiver shall have the authority which is appropriate to rectify the condition or problem, which depending upon the circumstances may include authority to enter into the Network operations center for the purpose of taking control of, monitoring or continuing operation of all or any portion of the Network for the benefit of Company and the State and at Company's cost. State may continue the receivership until such time as Company or any Lender cures any existing Company or S&W Default and provides reasonable assurances that methods, systems and procedures and modifications thereto required by State are in place to avoid future similar occurrences. So long as State undertakes such ex parte application in good faith, even if under a mistaken belief in the right to do so, such action shall not expose State to any liability to Company or S&W and shall not entitle Company or S&W to any other remedy, it being acknowledged that the State has a paramount public interest in maintaining and sustaining communications vital to public health, safety and welfare.

(d) State shall have the right to perform Company's or S&W's construction obligations as follows.

(i) If at any time a Company or S&W Default respecting construction occurs and Company or S&W does not cure it within the cure period, if any, available therefor, then State, without further notice and without waiving or releasing Company or S&W from any obligations, shall have the right, during the pendency of such Default, but shall not be obligated, to perform construction as may then be required.

(ii) If State exercises any right to perform construction obligations of Company or S&W, in the exercise of such right it may, but is not obligated to, among other things: (A) employ security guards and other safeguards to protect the work; (B) spend such sums as State deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors as may be required for the purpose of completing the work; (C) draw on and use proceeds from payment and performance bonds to pay such sums; (D) execute all applications, certificates and other documents in the name of Company or S&W as may be required for performing or completing the work; (E) make and approve modifications, changes and alterations to the Plans and Specifications as State reasonably determines appropriate to fulfill the purposes of this Agreement; (F) modify or terminate any contractual arrangements with third parties; (G) take any and all other actions which it may in its good faith discretion